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**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

**FILE:** B-218638 **DATE:** July 26, 1985  
**MATTER OF:** Litton Systems, Inc., Potentiometer  
Division

**DIGEST:**

1. Protest that awardee's product was not properly qualified and, therefore, awardee should not have been competitively solicited is untimely when filed with both contracting agency and GAO after closing date for receipt of proposals where solicitation indicated that the awardee's product had been approved as a qualified product and awardee was being solicited for the required part.
2. Where solicitation was not set aside for labor surplus area concerns, there was not a tie bid situation and offers were not evaluated under Buy American Act clause, protester was not prejudiced by agency's failure to consider its status as a labor surplus area concern since consideration of protester's labor surplus area status would not have changed outcome of competition. See Federal Acquisition Regulation, 48 C.F.R. § 52.220-1 (1984).

Litton Systems, Inc., Potentiometer Division (Litton), protests the award to Northern Precision Labs (NPL) under request for proposals (RFP) N00383-85-R-2961 issued by the Naval Supply Systems Command (Navy) covering a requirement for sensors used in the CH53 Helicopter Automatic Flight Control System.

We dismiss the protest in part and deny it in part.

As background to the subject protest, the following information is relevant. The Navy reports that until mid-1984 the modified sensor which is the subject of this protest was procured on a sole-source basis from Litton as the only sensor approved by the Navy. In May 1984, NPL sought approval to qualify as a source to be competitively solicited on procurements for the modified sensor and, following testing, the Navy approved NPL's part in August 1984. Based upon this approval, both Litton's and NPL's

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products were considered to be qualified. On October 12, 1984, the Navy issued a competitive negotiated solicitation to both firms (RFP N00383-850R-0116) covering a basic quantity of 2,762 sensors and containing an option for an additional 2,762 sensors. The solicitation identified sensors of both Litton and NPL as approved products by listing their respective Federal Supply Code Manufacturers numbers and parts numbers in the RFP schedule. Also, the proposed requirement had been synopsisized in the Commerce Business Daily (CBD) on October 6, 1984, and specifically identified the Litton and NPL parts numbers and stated that the RFP had been issued to both NPL and Litton. Although NPL offered to provide the sensors at \$392 per unit, the contract was awarded to Litton on January 10, 1985, on the basis of its lower price of \$361.85 per unit.

In March 1985, the contracting officer was advised of a requirement for an additional 2,762 sensors, the quantity covered by the option provision in Litton's contract. However, since the contracting officer was unable to determine that the option price was most advantageous to the government pursuant to Federal Acquisition Regulation (FAR), 48 C.F.R. § 17.207(c) (1984), the Navy issued RFP N00383-85-R-2961--the subject of this protest--on March 26, 1985, covering the quantity of 2,762 additional sensors with a closing date for receipt of proposals set for April 15, 1985. In fact, the schedule of this solicitation was identical to the preceding solicitation and noted that since the solicitation was issued with respect to the existing contract's option, the government might make an award either under the new solicitation or the option provision of the contract, whichever was determined to be in the best interests of the government. A contract was awarded to NPL pursuant to this RFP on May 3, 1985, on the basis of its lower price of \$324 per unit as compared to Litton's price of \$335 per unit.

By letter of May 7, the Navy notified Litton that award had been made to NPL. Litton protested to the Navy by telex dated May 8 and, before resolution of its protest to the Navy, Litton filed a protest in our Office on the same basis on May 23. Essentially, Litton protests the solicitation of NPL as a source for the sensors because it believes NPL's product was not subjected to the same tests to which Litton's product was subjected in order to be approved as a qualified product by the Navy. Thus, Litton argues that NPL should not have been competitively solicited under the RFP.

We dismiss this basis for the protest as untimely. Our Bid Protest Regulations, 4 C.F.R. part 21 (1985), require that protests based upon alleged solicitation improprieties which are apparent before the closing date for receipt of initial proposals must be filed prior to that date. 4 C.F.R. § 21.2(a)(1) (1985). It should have been apparent to Litton that NPL was being solicited in the present procurement from the October 12, 1984, and March 26, 1985, RFP's, which listed the Federal Supply Code Manufacturer numbers and the parts numbers for both Litton and NPL, and from the October 6, 1984, CBD notice 1/, which specifically referenced NPL's part number as "Northern Precision Lab, P/N 800992-22," while clearly stating that the "RFP has been issued to Northern Precision Labs, Litton Inds." Accordingly, Litton's protest alleging this apparent solicitation impropriety filed with this Office on May 23, 1985, after the closing date for receipt of initial proposals on April 15, 1985, is untimely.

Litton also states that it is located in a labor surplus area and, while the precise basis for Litton's objection is not clear, the protester cites FAR, 48 C.F.R. § 52.220-1, and generally questions the Navy's interpretation of that provision. The Navy reports that the solicitation, which was not a labor surplus area set-aside, incorporated by reference FAR, 48 C.F.R. § 52.220-1, "Preference for Labor Surplus Area Concerns," which allows a preference for labor surplus area concerns (1) in case of tie offers, or (2) if the offer is to be evaluated in accordance with the Buy American Act clause. Because this procurement was not set aside for labor surplus area concerns, there was not a tie bid situation, and offers were not evaluated under the Buy American Act clause, we fail to see the relevance of the fact that Litton is a labor surplus area concern. In any

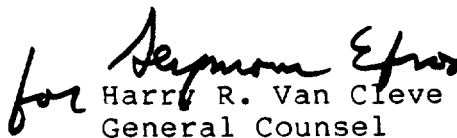
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1/ We have held that publication of a procurement in the CBD constitutes constructive notice of the solicitation and its contents. Cullinet Software, Inc., B-216442, Jan. 23, 1985, 85-1 C.P.D. ¶ 89; Detroit Broach and Machine, B-213643, Jan. 5, 1984, 84-1 C.P.D. ¶ 55.

event, in the present circumstances, Litton's status as a labor surplus area concern would not have changed the outcome of the competition and, therefore, there has been no prejudice to Litton. See Technical Services Corp., et al., B-190945, et al., Aug. 25, 1978, 78-2 C.P.D. ¶ 145 at 15.

Finally, to the extent that the protester's request for a review of the labor surplus area requirements of this solicitation may be construed as a protest that the procurement should have been a labor surplus area set-aside under FAR, 48 C.F.R. § 52.220-2, such an objection is untimely. The fact that the solicitation was not a labor surplus area set-aside was clearly evident from the face of the solicitation and thus should have been protested, if at all, prior to the closing date for receipt of initial proposals. See 4 C.F.R. § 21.2(a)(1) (1985).

The protest is dismissed in part and denied in part.

*for*   
Harry R. Van Cleve  
General Counsel